

Enclosure 2
EPA December 2009 Identification of ARARs Letter

Regulations, Guidance, Etc. Determined Not to be ARARs

| Regulation | Citation | Identified by LWG | Identified by DEQ | Applicability/Relevance and Appropriateness |
|---|-----------------------------------|-------------------|---|--|
| State of Oregon Requirements | | | | |
| Oregon Environmental Cleanup Law – Current and reasonably likely land and beneficial water uses | OAR 340-122-0030(6) and -0085(6). | No | Yes – Applicable as action specific requirement | Under Oregon’s cleanup law, DEQ, makes discretionary administrative beneficial land and water use determinations for purposes of selecting a response action. The regulation does not contain substantive standards, thus is only procedural and, thus, is not an ARAR. |
| Removal-Fill in Oregon Essential Indigenous Anadromous Salmonid Habitat - | ORS 196.810 (1)(b) OAR 141-102 | No | Yes – Applicable as action specific and location specific requirement | The regulations provide for how essential indigenous and anadromous salmonid habitat is designated and requires DSL to consult with Fish and Wildlife in authorizing any dredge or fill activity in such areas. EPA is coordinating cleanup decisions with the Oregon Fish and Wildlife Department through the TCT and ODFW's participation on the Trustee council. EPA as a matter of policy coordinates and consults with NMFS under Section 7 of the ESA related to critical habitat for listed species and the Magnuson-Stevens Fisheries Act related to essential fish habitat. The requirement to obtain a permit or consult with OFW is procedural. If the OFW designation of essential indigenous salmonid habitat within the Portland Harbor encompasses more area than NMFS' designated critical habitat, EPA will use the state designation for purposes of analyzing impacts to such EISH area in the feasibility study and, specifically, the CWA 404(b)(1) analysis. |

| Regulation | Citation | Identified by LWG | Identified by DEQ | Applicability/Relevance and Appropriateness |
|---|--|-------------------|--|---|
| Oregon Threatened or Endangered Wildlife Species – Incidental Take Permits | ORS 496.171-192 OAR 635-100-0170 | No | Yes – Applicable as action specific and location specific requirement | Per Section 121(e) of CERCLA, no federal, state, or local permit is required for on-site response actions. |
| Lower Willamette River Management Plan | Lower Willamette River ORS 273.045 OAR 141-080-0105 | No | Yes – Relevant and Appropriate as action and location specific requirement | Hazardous waste cleanups are exempt from the plan and all of the General or provisional conditions for permits are waived. The plan provides guidance for DSL in deciding to permit certain uses of submerged lands. However, DSL can waive or make decisions inconsistent with the plan. In addition, the plan does not provide substantive criteria or requirements for conducting cleanups that are not otherwise required by other state or federal laws. |
| Classification of Water as to Highest and Best Use – Willamette Basin Program | ORS 536.300, 340 <u>et seq.</u> OAR 690-502 <u>et seq.</u> | No | <u>To be Considered:</u> regarding beneficial uses and selection of remedial action. | The identified regulations relate to policies and designated uses for purposes of allowing water to be appropriated, e.g., used by a third party. None of the alternatives for the FS is likely to need to use Willamette River water or groundwater in performing the cleanup. However, if such an alternative is proposed, EPA will reconsider which of the relevant statutory or regulatory requirements may be TBCs. However, under current circumstances there does not appear to be any substantive criteria, requirements, or limitations set forth in in the regs. as a general matter to rise to the level of a TBC. |
| Guidance for Identification of Hot Spots DEQ, 1998 | Oregon Hazardous Substance Remedial Action Rules OAR 340-122 <u>et seq.</u> | No | <u>To be Considered:</u> in selection of remedial action methodologies. | DEQ's current regulations that define what a hot spot is for sediment and surface water has been identified as an ARAR. This guidance seems out of date, issued prior to the latest regulations and does not add any substantive standards. |

| Regulation | Citation | Identified by LWG | Identified by DEQ | Applicability/Relevance and Appropriateness |
|---|--|--|---|--|
| Guidance for Conducting Beneficial Water Use Determination at Environmental Cleanup Sites. DEQ, 1998 | Oregon Hazardous Substance Remedial Action Rules OAR 340-122 <u>et seq.</u> | No | <u>To be Considered:</u> in risk assessment and selection of remedial action methodologies. | DEQ regulations that authorize DEQ cleanup program to determine beneficial uses of groundwater is less stringent than CERCLA. |
| Guidance for Consideration of Land Use in Environmental Remedial Actions DEQ, 1998 | Oregon Hazardous Substance Remedial Action Rules OAR 340-122 <u>et seq.</u> | No | <u>To be Considered:</u> in risk assessment and selection of remedial action methodologies. | Insufficient information provided that illustrates that this guidance provides any standards or criteria that is not already covered by one or more of EPA's guidances on land use issues. |
| State Harbor Line Statue | ORS 778.085 | Yes – Applicable as action and location specific requirement | No ⁱ | DEQ did not identify these statute as ARAR, and insufficient information otherwise has been submitted. |
| Other Criteria, Advisories, Guidance and To be Considered Initiatives ⁱⁱ | | | | |
| Watershed Management and Enhancement and the Oregon Plan | ORS 541 | Yes | No | DEQ did not identify this statute as ARAR. Insufficient information provided as to what substantive standard or criteria the law contains that is relevant to Portland Harbor cleanup. |
| Wy-Kan-Ush-Mi Wa-Kish Wit | www.critfc.org/text/TP.RP.htm | Yes | NA | The plan is a tribal document. Insufficient information has been provided regarding what substantive criteria, standards or requirement such documents contains that may be relevant or well-suited for the Portland Harbor cleanup. |

ⁱ Note: The State of Oregon specifically declined to include the State Harbor Line Statue (ORS 778.085) as an ARAR.

ⁱⁱ Note: The State of Oregon specifically declined to include City of Portland Greenway Code (PCC 33.440) and Flood Hazard Area (PCC 24.50) as ARARs.